Trinity Term
[2017] UKPC 21
Privy Council Appeal No 0074 of 2016

JUDGMENT

Miller and another (Appellants) *v* Miller and another (Respondents) (Jamaica)

From the Court of Appeal Jamaica

before

Lord Kerr
Lord Clarke
Lord Wilson
Lord Carnwath
Lord Hughes

JUDGMENT GIVEN ON

6 July 2017

Heard on 15 June 2017

Appellants
Ransford Braham QC

(Instructed by Axiom Stone Solicitors)

Respondents
B St Michael Hylton QC
Melissa S McLeod
(Instructed by Myers Fletcher & Gordon Solicitors)

LORD WILSON:

1. Although nominally both a second appellant and a second respondent are parties to these proceedings, the active appellant is the husband and the active respondent is the wife, as it will be convenient to describe them notwithstanding their divorce. All references to "the parties" will be a reference only to them.

2. The subject of the dispute between them is a property at Yardley Chase in the parish of Saint Elizabeth ("Yardley Chase"). It was bought in 2004 and placed in the joint names of the parties "to hold the same unto [their] use". It remains in their joint names. A hotel was then built there. It was damaged by Hurricane Dean in 2007 and was thereafter reconstructed. The husband continues to live there and appears to continue to run a hotel business there.

3. In March 2009 the wife issued a claim in the Supreme Court for a declaration that she was the sole beneficial owner of Yardley Chase. On 9 January 2012 Donald O McIntosh J dismissed her claim and ordered her to assign to the husband her legal interest and any beneficial interest in it. On 17 July 2015 the Court of Appeal (Dukharan JA, Brooks JA who gave the only substantive judgment, and McDonald-Bishop JA (Ag)) allowed the wife's appeal; ruled that there was no reason to depart from the original intention of the parties, which had been to hold the beneficial interest in Yardley Chase in equal shares; and so ordered that, subject to the grant of an option to the husband to buy the wife's share and also to the imposition upon him of a duty to account to her for the benefit of his sole occupation of it since 2007, Yardley Chase should be sold and the proceeds divided equally between them.

4. Against the order of the Court of Appeal the husband appeals to the Board. He seeks the restoration of the order of McIntosh J but, at the oral hearing of the appeal, Mr Braham QC on his behalf added a request, which became his fall-back position, that the Board should order the wife's claim to be re-tried, presumably (in the light of what follows) by a judge other than McIntosh J.

5. Both parties are Jamaican citizens. But they met in Hartford, Connecticut; their marriage in 1993 took place there; and they lived there throughout their marriage. They had three children, now aged 21, 19 and 15. During most of the marriage the husband ran a motor repair business, which included some selling of restored cars, in Hartford; and the wife worked in the loans department of the Bank of America, where she secured significant promotions, indeed in 2002 up to the level of a mortgage loan officer which carried a substantial salary.

6. In 2007 the marriage broke down and the wife moved with the children to a home in the state of Georgia, which the parties had recently bought. It seems that she continues to live there and that the children continue to make their base with her there.

7. In 2007 the wife issued proceedings for divorce in the Superior Court in Hartford. On 1 December 2008 that court granted a decree of divorce. Importantly for present purposes, attorneys for the wife and the husband joined in presenting to that court at that hearing a Separation Agreement to which that date was also ascribed. Having heard their submissions and having received oral evidence from each of the parties, the judge found the agreement to be fair and he incorporated it into the court's judgment by reference.

8. At that hearing the judge noted that there was one major dispute between the parties which had not been resolved and which had therefore been excluded from the Separation Agreement. This was their dispute in relation to the present and future ownership of Yardley Chase. He was told that there were complex legal issues in relation to it and that, in the absence of agreement, the dispute would be presented to the courts of Jamaica.

9. The Separation Agreement makes clear that the attorneys who appeared before the court on 1 December 2008 each gave full separate advice to the husband and wife in relation to it; indeed the parties executed the agreement in front of their respective attorneys acting as commissioners.

10. In effect the Separation Agreement provided for a clean break between the parties. It provided for the division between them of five properties:

(a) 7 Shepard Road, Bloomfield, Connecticut. This was the final matrimonial home, vested in the parties' joint names. The agreement provided that it should become the wife's sole property, subject to three heavy mortgages.

(b) 269 Tower Avenue, Hartford. These were the premises at which the husband had conducted his garage business. The agreement provided that it should become his sole property. It was unmortgaged and, at any rate by the time of the agreement, it was generating rental income.

(c) 14 Lilac Street, East Hartford. This was in the wife's sole name. It was under mortgage but generated rental income. The agreement provided that it should remain her sole property.

(d) 4874 Planters Walk, Douglasville. This was the home in Georgia to which the wife and children had recently moved. It was held in joint names subject to heavy mortgages. The agreement provided that, subject to them, it should become the wife's sole property.

(e) Top Hill, St Elizabeth, Jamaica. This was a house in the joint names of the parties. The agreement provided that they should each transfer their interest in it to a trustee on trust for the three children but that the husband, who at that time was living there, should be entitled to continue to live in part of it for one further year.

11. There was an interesting provision in the Separation Agreement for the husband to pay child support in accordance with state guidelines. It is interesting because it provided as follows:

> "For purposes of calculating child support, the parties shall impute annual income of $27,500 to the … Husband, and $120,000 annually to the …Wife."

So it certainly seems that, by the end of the marriage (and, so she contends, during most of it) the wife was earning vastly more than was the husband. Indeed early in 2008 the husband had issued in the proceedings a claim for alimony against the wife. The agreement also included a mechanism for the husband to pay the child support out of the rental income which was expected to continue to be generated by the commercial premises at 269 Tower Avenue. In fact, however, the husband sold the premises within two months of the date of the agreement; and the Court of Appeal regarded it as significant that he had entirely failed to pay the agreed child support.

12. In the proceedings in relation to Yardley Chase which she issued shortly after execution of the Separation Agreement, the wife contended that:

(a) the purchase price of the vacant land in 2004 was US$16k, which she provided out of her income;

(b) it was the husband who went to Jamaica and managed the purchase;

(c) between 2004 and 2006 the hotel was built;

(d) the cost of constructing and equipping it was US$700k, which she funded by means of a loan, still outstanding, of US$400k from her uncle and otherwise out of her income;

(e) in 2006 the parties began to manage the hotel through a company which they had set up; and

(f) in 2007 the husband went to live in Jamaica and, through a different company set up by himself, took control of the management of the hotel.

The wife also relied on the fact that, in breach both of an agreement in the proceedings in Connecticut dated 7 November 2007 and of an order of the Jamaican court dated 11 January 2011, the husband failed to provide an account of the income derived by him from the hotel from 2007 onwards. By the end of the hearing before McIntosh J, she had adjusted the claim which she had made to sole beneficial ownership of Yardley Chase so as to become a claim for a declaration that it was held as to 80% for her and as to 20% for the husband.

13. By contrast the husband contended that:

(a) at the time of the purchase of the land at Yardley Chase in 2004 he and the wife intended to own the property equally;

(b) apart from a contribution by the wife out of her own resources of no more than US$20k and a loan of US$127k which had been taken out by both of them (perhaps, so he conceded, as early as 2002) from the bank which employed his wife, he paid out of undocumented cash income from his business not only for the purchase of the land but also for the construction and equipment of the hotel, for the substantial works of reconstruction following the hurricane and for the adjacent construction of a house for his own use;

(c) the loan alleged by the wife to have been made to her by her uncle had never been made; and

(d) in all the circumstances the court should declare that the beneficial interests in Yardley Chase should be held as to 80% for him and as to 20% for the wife.

14. The reserved judgment of McIntosh J comprises 13 short paragraphs set over two and a half pages. With regret, the Board suggests that the adequacy of the judgment can be gauged from the following:

(a) The judge recorded that the parties had acquired three properties in the US. In fact they acquired four.

(b) The judge stated that there was no dispute that it was the husband who purchased the property at Yardley Chase. On any view his statement was ambiguous but on balance the Board considers that the judge meant to refer only to the husband's management of the purchase and that the Court of Appeal was therefore wrong to count it as one of the judge's serious errors.

(c) The judge rejected the wife's evidence that she had applied money borrowed from her uncle to the purchase of the property and to the construction of the hotel. The reason given by the judge was that the evidence of the uncle's son was that the garage business of the husband was vastly superior to that of the uncle. In fact the uncle's son had given no such evidence but in any event it did not follow from any relative inferiority of the uncle's business that he had not made the alleged loan.

(d) The judge accepted the evidence of the parties that they pooled their resources; and the husband accepts that his finding was that the cost of the purchase and of the construction of the hotel had been met out of these pooled resources. But the judge made no finding as to the size of their respective contributions to that pool.

(e) The judge stated that under the Separation Agreement the wife had received all three of the properties in the US. This was a grave error; for the husband had received 269 Tower Avenue, which was indeed the only property free of mortgage.

(f) The judge said that it did not seem that the husband had received legal advice or representation in relation to the agreement. This was another grave error and it is hard to understand how it could have arisen: the fact that he had full, separate, legal advice and representation is obvious both from the agreement itself and from the transcript of the hearing on 1 December 2008.

(g) The judge observed that the husband had seemed to comply with the wife's orders in signing away his interests. This observation is not supportable.

(h) The judge's conclusion was that the husband's contribution "in terms of the four other properties, his procurement of the land, his efforts in the building of the hotel and management of same" far outweighed that of the wife. As the Court of Appeal concluded, the judge's reference to the husband's contribution "in terms of the four other properties" (in which, therefore, he was for some reason including the other property in Jamaica placed in trust for the children) can sensibly relate only to his contribution in having transferred his interest in three of the US properties to the wife. In other words the judge considered that the agreement had been so advantageous to the wife as to require, in favour of the husband, an adjustment to the distribution between them of the ownership of Yardley Chase.

(i) The judge concluded his judgment by finding that the wife's claim was malicious and initiated by greed and a desire to destroy the husband. No explanation was given for this arresting conclusion.

15. In the light of the above the husband's counsel in the Court of Appeal faced a challenging task in seeking to uphold the judge's award to the husband of 100% of the beneficial interest in Yardley Chase (being indeed a proportion greater than he had himself suggested). What is significant, however, is that his counsel never submitted, as a fall-back, that the matter should be re-tried. She may well have considered that proper findings of fact about, in particular, the size of the respective financial contributions to the acquisition and development of Yardley Chase would not have been to the husband's advantage. For the wife's documentary evidence in support of her contentions, though limited, exceeded that of the husband in support of his contentions; indeed adverse inferences might well have been drawn from the husband's clear breach of the order for him to account for his income from the hotel for the previous four years. In the Board's view, however, there was sufficient material for the Court of Appeal to reach for itself a conclusion on the wife's claim; and the last-minute attempt on behalf of the husband to persuade the Board to favour a re-trial not only comes too late but invites a course which it concludes to be unnecessary.

16. As has at all times been common ground between the parties, the application of the wife was, as a spouse, for a "division of property" under section 13 of the Property (Rights of Spouses) Act ("the PROSA"). For the purposes at any rate of an application under section 13, a "spouse" includes a former spouse: see section 13 (3). The application enabled the court to exercise its powers under section 14(1)(b) to divide Yardley Chase as it thought fit in the light of the factors set out in subsection (2). These factors include, at (a), the contribution of the parties (widely defined in subsection (3)) to the acquisition or improvement of the property; at (c), the duration of the marriage; at (d), the existence of any agreement with respect to the ownership and division of property; and at (e), any other circumstances which justice requires to be taken into account.

17. The Court of Appeal treated the application as having also been made under section 15(1) of the PROSA. Headed "Alteration of Property Interests", the section empowers a court to alter the interest of either "spouse" in a property, including, at (b), by transfer of it from one to the other. Under subsection (2) no order can be made unless the court is satisfied that it is just to do so; and under subsection (3) the court must have regard to the effect of the proposed order on the earning capacity of each spouse and, so far as relevant, to the factors set out in section 14(2). In its preparation for the hearing the Board had developed an inclination better to understand the difference between the jurisdictional territories, albeit perhaps overlapping, of section 13 and section 15; and so it was interested to learn at the hearing that such is the subject of debate in Jamaica itself. But, without analysis of the difference by the Court of Appeal either in the present case or, apparently, elsewhere, it would be inappropriate for the Board to venture an opinion about it.

18. A major issue before the Court of Appeal related to the judge's treatment of the Separation Agreement. In this respect the Court of Appeal referred in passing to section 10 of the PROSA, which provides for the enforceability of agreements between spouses for the division of their property, subject to their compliance with procedural safeguards and save where it would be unjust to enforce it. But section 10 (10) provides:

> "Any property to which an agreement under this section does not apply shall be subject to the other provisions of this Act."

The result is that section 10 has no direct relevance to the treatment of the agreement in determination of the issue in relation to Yardley Chase.

19. As however has already been noted, section 14(2)(d) of the PROSA entitles the court to take into account the existence of an agreement with respect to the ownership and division of property. So the judge was entitled to take the Separation Agreement into account. But in what way should he have taken it into account? To what extent? And with what result?

20. Even if, on analysis, the Separation Agreement had turned out to be a factor of substantial relevance to the issue before the judge, the fact remains that he materially misunderstood its terms. But in the Board's view there was in any event no scope for him to have concluded that the effect of the agreement was disadvantageous to the husband and thus such as to require adjustment in his favour to the distribution of the future ownership of Yardley Chase. Contrary to the judge's understanding, the husband received full independent legal advice prior to entry into the agreement. Asked by his attorney at the hearing on 1 December 2008 whether he believed that the agreement was fair and equitable, the husband answered "yes". Once the effect of the agreement had been fully explained to him by the attorneys, the judge at that hearing declared the

agreement to be "fair and equitable". The closing written submissions made on behalf of the husband to McIntosh J argued only faintly to the contrary and without supporting detail; and on any view those submissions were never to the effect that the husband had entered into the agreement on the wife's orders. The Board concludes that the only proper course for McIntosh J would have been to proceed on the basis that the agreement had been fair to both parties; that it was therefore not such as to influence the outcome of the issue before him; and that although potentially relevant under section 14(2)(d) of the PROSA, the agreement was, on analysis, of no substantial relevance. At the hearing before the Board counsel for the wife produced a table, derived from the record, which suggested that the market value of 269 Tower Avenue, awarded to the husband under the agreement, vastly exceeded the equities in the three US properties awarded to the wife. The Board considers that it has no need to explore that suggestion. It is enough for it to conclude that, on analysis, the agreement was a neutral factor.

21. The husband's major criticism of the decision of the Court of Appeal is that it began its own - necessary - analysis of the case with a finding that, at the time of purchase of the land at Yardley Chase, the parties intended to own it in equal shares. The husband contends that its analysis runs counter to section 4 of the PROSA, which provides that:

> "The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property …"

There are two limbs to the Board's answer to this contention.

22. The first limb is that, in making its finding, the Court of Appeal had no need to resort to the rules and presumptions of the common law or of equity. For it was an agreed fact that the parties had intended to own Yardley Chase in equal shares. The indenture of purchase had provided for the parties to hold it "to [their] use"; and the husband's own evidence had confirmed that, although (so, at any rate, was his contention) the wife had made no contribution towards its acquisition, the property was intended to be held by the two of them beneficially in equal shares.

23. The second limb is that, in the opinion of the Board, it is a misunderstanding of section 4 of the PROSA to conclude that it is never appropriate for the court to begin its analysis of issues in relation to property under section 13 (or, for that matter, under section 15) by reference to the existing proportions of beneficial ownership of the property. In many cases the existing proportions may well not be a finishing-point; but often, albeit not always, they may be a helpful starting-point. It may sometimes be difficult to "divide" property under section 13 without knowing to whom it presently

belongs. On any view it may be difficult to order an "alteration of property interests" under section 15 without knowing by whom those interests are presently held. The provision in section 12(2) of the date for the court's determination of a spouse's "share in property" clearly requires identification of that share. So, while the Board must not be misunderstood to be recommending that the courts should, as they were required to do prior to the coming into force of the PROSA, conduct a protracted analysis of the precise proportions in which the parties own the property in dispute, the existing proportions of their ownership, taken broadly, can be, as they were in the present case, a legitimate starting-point.

24. Having adopted, as a starting-point, the fact that the parties both intended that the property should be in their equal beneficial ownership and that, even on the judge's findings, the costs of purchase and of the construction of the hotel had been met out of their pooled resources, the Court of Appeal proceeded to conduct an analysis, scarcely criticised on behalf of the husband, of the other factors in favour of the wife's claim to an award of 80% of such ownership and of the husband's converse claim to an award of 80% of it. Its conclusion was:

> "Based on all the above, it seems that there is no basis for departing from the equal allocation that the parties intended at the time of their acquisition of the property and the construction of the building. As a result the fair allocation of the interest in the property should be 50% each."

25. The Board finds no fault with the conclusion of the Court of Appeal.

26. In the course of his judgment Brooks JA made reference to speeches in the House of Lords and to judgments in the UK Supreme Court in relation to the modern working-out of the provisions of the Matrimonial Causes Act 1973 in England and Wales. It will be seen that the Board has not considered it necessary to make any such reference. No doubt references to decisions in relation to the fairly comparable provisions of the 1973 Act in England and Wales may sometimes be helpful in determining issues under the PROSA. But the latter appears to the Board to be in principle an admirable enactment, quite robust enough to stand, in most cases, upon its own two feet.

27. So the Board will humbly advise Her Majesty to dismiss the husband's appeal and, subject to some dramatic submission placed on his behalf before the Board within 14 days of promulgation of this Advice, to order the husband to pay the wife's costs of the appeal to it.